

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director, Immigration and
Naturalization Service, United States Department of
Justice, District No. 16,

Appellant,

vs.

ESTHER PUPKO,

Appellee.

APPELLANT'S BRIEF.

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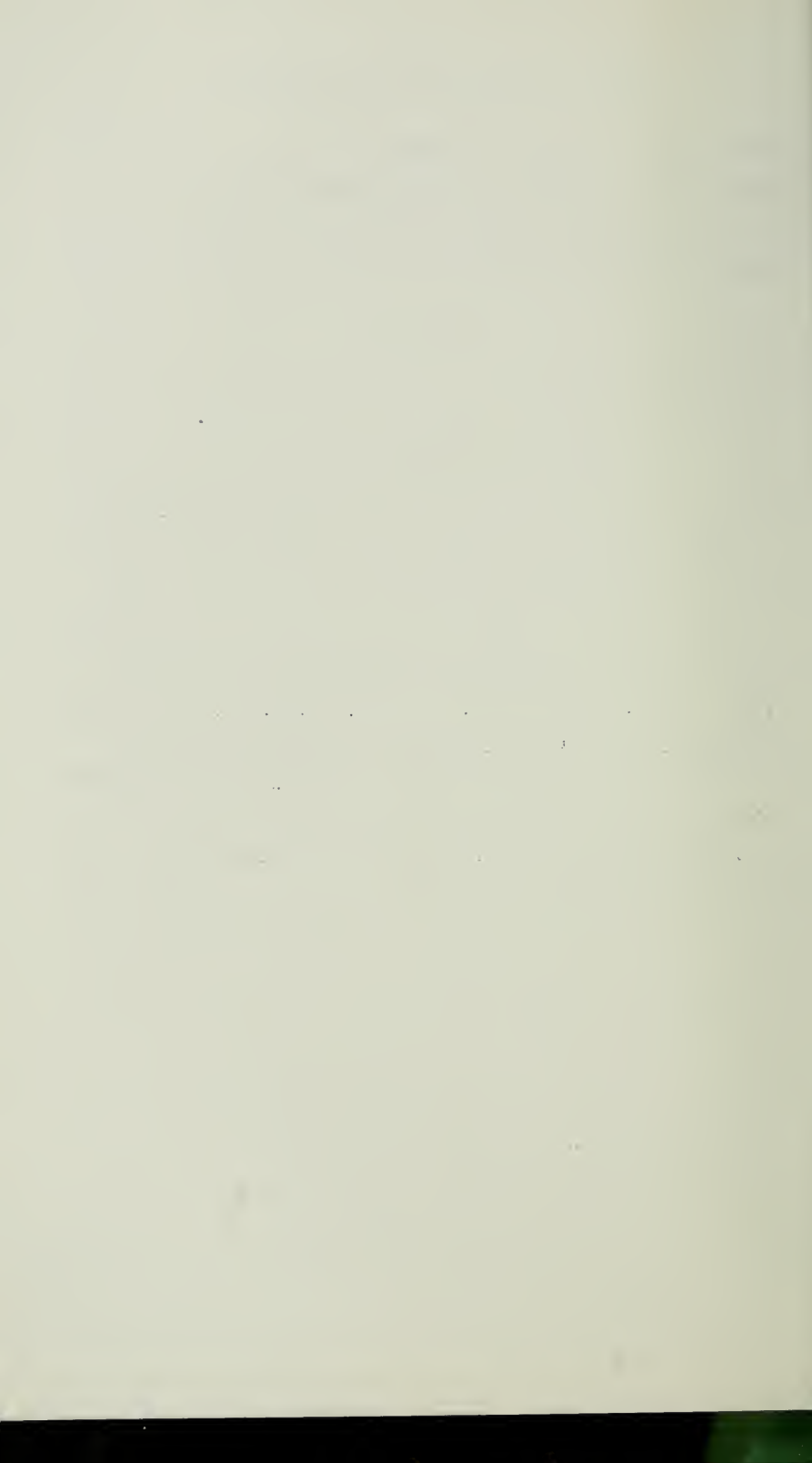
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No. 11284.

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Appellee.

APPELLANT'S BRIEF.

Jurisdiction.

The petition of the appellee for admission to citizenship under Section 307 of the Nationality Act of 1940 (54 Stat. 1142; 8 U. S. C. 707), was filed in the United States District Court on July 21, 1944 [R. 5, 6].

The jurisdiction to naturalize aliens as citizens of the United States is conferred upon the District Courts by Section 301(a) of the Nationality Act of 1940 (54 Stat. 1140; 8 U. S. C. 701).

The decision of the District Court granting the petition and admitting appellee to citizenship was entered on September 28, 1945 [R. 22, 23, 65]. Notice of appeal was filed in this Honorable Court on December 26, 1945 [R.

23, 24], and the transcript of record was filed on March 27, 1946 [R. 66].

Jurisdiction is conferred upon this Honorable Court to review the final decisions of the District Courts of the United States by Section 128 of the Judicial Code, as amended (Title 28, U. S. C., Sec. 225(a)), wherein it is provided that "the Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions * * * in the district courts," except as otherwise provided.

The order of the District Court in granting the petition and admitting appellee to citizenship is a final decision within the meaning of the above section.

Tutun v. United States, 270 U. S. 568, 46 S. Ct. 425, 70 L. Ed. 738;

United States v. Rodiek, 162 Fed. 469 (9th Cir.).

Statutes Involved.

Section 301(d) of the Nationality Act of 1940 (54 Stat. 1140; 8 U. S. C. 701) provides:

"A person may be naturalized as a citizen of the United States in the manner and under the condition prescribed in this Act, and not otherwise."

Section 307(a) of the Nationality Act of 1940 (54 Stat. 1142; 8 U. S. C. 707) sets forth the general requirements for naturalization:

"No person * * * shall be naturalized unless such petitioner (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the state in which the petitioner resided at

the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) *during all the periods referred to in this subsection has been and still is a person of good moral character*, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.” (Italics added.)

Section 334(a) of the Nationality Act of 1940 requires that:

“Every final hearing upon a petition for naturalization shall be had in open court before a Judge
* * * and every final order which may be made upon such petition shall be under the hand of the court * * *.”

Hearing of petitions for naturalization by designated officers of the Immigration and Naturalization Service is provided for in Section 333(a) of the Nationality Act of 1940 (54 Stat. 1156; 8 U. S. C. 733):

“The Commissioner * * * shall designate members of the Service to conduct preliminary hearings upon petitions for naturalization to any naturalization court and to make findings and recommendations thereon to such court. For such purposes any such designated examiner is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpoena witnesses and to administer oaths, including the oath of the petitioner to the petition for naturalization and the oath of petitioner’s witnesses.”

The filing of a preliminary form for petition for naturalization is provided for by Sec. 370.1, Title 8, Code of Federal Regulations:

“Each prospective petitioner for naturalization shall be required to fill out properly and sign preliminary application Form N-400 and submit it, * * *, to the immigration and naturalization office * * *.”

Statement of the Case.

Appellee declared her intention to become a citizen of the United States before the Clerk of the United States District Court of Los Angeles on June 16, 1942 [R. 2]. On July 12, 1944, appellee filed with the Clerk of Court her petition for naturalization [R. 5, 6]. There was filed with the Petition of appellee her declaration of intention issued June 16, 1942 [R. 2], also “Certificate of Arrival” attesting that the appellee had been admitted to the United States for lawful permanent residence [R. 4]. On April 26, 1945, there was also filed with the District Court, “Certificate of Loyalty” [R. 7] excepting appellee from the classification of alien enemy.

Motion for denial of appellee’s petition dated September 18, 1945, was filed with the District Court [R. 8]. Thereafter on September 28, 1945, there was filed with the court below a list of petitions recommended to be denied, including under Item No. 9 the name of appellee [R. 20, 21]. The petition of appellee was heard in open court on September 28, 1945 [R. 19, 32 to 66], and the recommendation of denial was disapproved by the presiding Judge who granted appellee’s petition and admitted her to citizenship of the United States [R. 22, 23, 65].

Notice of appeal was filed with the District Court on December 26, 1945 [R. 23, 24].

Summary of Facts.

Appellee is a native of Roumania, and remained a national of Roumania [R. 5], up until the time of her admission to citizenship. She has never been married [R. 47]. She was admitted to the United States for lawful permanent residence on January 16, 1921 [R. 4] and has since resided continuously in the United States [R. 5]. On June 16, 1942, the appellee declared her intention to become a citizen of the United States [R. 2]. On July 2, 1944, appellee filed with the court below, petition for naturalization [R. 5, 6, 37] under the general law requiring the establishment of her behavior as a person of good moral character for the period of five years immediately preceding the date of filing petition for naturalization and hereafter to the date of her admission to citizenship. Preliminary to filing petition for naturalization, appellee submitted to the Immigration and Naturalization Service on its Form No. 2314, entitled "Application for Certificate of Arrival and Preliminary Form for Petition for Naturalization," her application to file a petition for naturalization [R. 18a, 18b, 37, 38, 39, 40]. In answer to printed question No. 30, appearing on the said form, appellee wrote in the answer "no" [R. 18b, 37]. The question reads: "Have you ever been arrested or charged with violation of any law of the United States or state or city ordinance, or traffic regulation? If so, give full particulars."

The fact was that appellee had been arrested in Palm Springs, California, and was on February 5, 1945, convicted for resorting and for registering at a hotel under the name of Elaine Parker [R. 9, 10, 14, 15, 34, 35, 36], in violation of ordinances of the City of Palm Springs

No. 126 [R. 11, 34, 35, 36], and No. 127 [R. 16, 17, 18, 34, 35, 36].

Just prior to executing the oath to the petition before the Clerk of the United States District Court on July 12, 1944, the appellee was sworn by Naturalization Examiner Davis, and in answer to questions by the said Examiner concerning whether or not appellee had ever been arrested, the appellee replied in the negative [R. 39]. The appellee admitted in her testimony before the United States District Court that she knew the answer she had given to Naturalization Examiner Davis to the effect that she had never been arrested was false [R. 40, 46]. When Appellee appeared before the clerk to execute her petition for naturalization, she swore to the truthfulness of the allegations contained therein, in the presence of her two witnesses [R. 4, 5, 40]. Immediately thereafter, appellee and her two witnesses appeared before designated Naturalization Examiner Parker. Miss Parker thereupon swore the appellee and her witnesses and in the presence of her witnesses appellee was questioned by Miss Parker, *inter alia*, as to whether her statement relative to never having been arrested was true and appellee again reaffirmed the truthfulness of her prior negative answer [R. 40, 42]. In the presence of the appellee, Miss Parker then questioned appellee's two witnesses as to whether or not appellee had, to their knowledge, ever been arrested and they also testified in the negative [R. 61].

Appellee did not thereafter reveal the fact of her arrest and convictions until sometime subsequent to the date of filing her petition for naturalization, and then, only when she was interviewed by an officer of the Immigration and Naturalization Service and confronted with copies of the

record evidence relating to her arrest and convictions in Palm Springs, California [R. 33, 38].

At the hearing before the United States District Court on appellee's petition for naturalization there was accepted in evidence certified copy of complaint, judgment, and order of the Judge of the City Court of Palm Springs, California [R. 9, 10, 14, 15, 34, 36, 66]. The complaint charged appellee with violation of ordinances of the City of Palm Springs, Nos. 126 and 127 [R. 9, 14, 15, 34, 35, 36]. These ordinances in substance make it a crime to register at a hotel in a name other than the true name of the person registering and prohibiting resorting to a hotel *et cetera*, in the City of Palm Springs with a person not the spouse of the person resorting for the purpose of sexual intercourse or for other immoral purposes [R. 11, 16.] The appellee pleaded guilty to the charge of registering under a name other than her true name and pleaded not guilty to the charge of resorting. She waived right to trial by jury and was found guilty by the City Judge of the charge of having resorted as well as having registered her name as Elaine Parker on the hotel register [R. 9, 10].

Questions at Issue.

Did the court err in finding that appellee during the five years immediately preceding the filing of her petition for naturalization had conducted herself as a person of good moral character as required by Section 307(a) of the Nationality Act of 1940 (8 U. S. C. 707(a))?

Did the court err in finding that the concealment by appellee of her arrest and convictions of crimes within the statutory period did not constitute bad moral character within the meaning of the law?

ARGUMENT.

It is our contention first that by reason of appellee's acts leading to arrest and convictions during the statutory period commencing July 12, 1939 [R. 33], and running to the time of appellee's admission to citizenship, she has failed to conduct herself as a "person of good moral character" within the meaning of that term as used in Section 307(a) of the Nationality Act of 1940 (8 U. S. C. 707(a)).

Secondly, that the appellee's deliberate concealment of her criminal record by means of false statements in the naturalization proceeding, is conduct which demonstrates a total failure to meet the burden of establishing that appellee was a morally fit candidate for receiving a grant of the high privilege of United States citizenship.

Required Proof of Good Behavior During the Prescribed Probationary Period of Residence.

Ever since the year 1795 Congress has required proof of good behavior during the probationary period of residence as a condition precedent to the granting of citizenship.¹ It is one of the three main basic tests prescribed, the other two, being proof of attachment to the principles of the Constitution and that the applicant is well disposed towards the good order and happiness of the United States.²

¹Act of Jan. 29, 1795 (1 Stat. 414). See, also, Act of Mar. 26, 1790 (1 Stat. 103, 104).

²Sec. 307(a), Nationality Act of 1940 (8 U. S. C. 707(a)).

An applicant's behavior during the statutory period is significant insofar as it supplies an index to his character.³ However, behavior alone is not necessarily decisive, and the applicant for naturalization must establish the fact of his good moral character during the prescribed period.⁴ The applicant has the burden of establishing that he has behaved as a person of good moral character.⁵ The applicant may only be granted citizenship in the manner and under the conditions prescribed by Congress, and not otherwise.⁶ Any doubt regarding the qualifications of an applicant for citizenship must be resolved in the Government's favor.⁷

On a plea of not guilty [R. 9, 14, 34, 35, 36] appellee was convicted [R. 10] of the charge of having resorted to a hotel room with a person to whom she was not married for the purpose of having sexual intercourse, and for other immoral purposes. The resorting occurred on January 31, 1943. She pleaded guilty to a charge of having registered at the same hotel on January 26, 1943, under the name of Elaine Parker [R. 14, 15]. The appellee states the resorting charge was false [R. 35]. The judgment of conviction is conclusive as against the unsup-

³*In re Nosen*, 49 F. (2d) 817.

⁴*U. S. v. Sherman*, 40 F. Supp. 478.

⁵*In re Vasicek*, 271 Fed. 326; *Maney v. U. S.*, 49 S. Ct. 15, 278 U. S. 17, 73 L. Ed. 156.

⁶Sec. 301(d), Nationality Act of 1940 (8 U. S. C. 701(d)); *U. S. v. Ginsberg*, 37 S. Ct. 422, 243 U. S. 472, 61 L. Ed. 853.

⁷*U. S. v. Manzi*, 48 S. Ct. 328, 276 U. S. 463, 72 L. Ed. 654; *In re Nybo*, 42 F. (2d) 727; *Petition of Oganessoff*, 20 F. (2d) 778.

ported denial of appellee.⁸ These convictions of the Palm Springs City Ordinances [R. 11, 12, 16, 17], stand as a legislative indictment that appellee's conduct was regarded as offensive to the generally accepted moral standards of the community. While it is true that the offense is designated as a misdemeanor and the prescribed punishment is light, the appellee's acts violated ordinances directly aimed at maintaining the moral standard of the community.

The courts have denied naturalization on the grounds that the petitioner had not established behavior as a person of good moral character during the probationary period within the meaning of the naturalization law in the following circumstances.

The Second Circuit Court of Appeals on the basis of insufficient showing of good moral character, reversed the order of the District Court admitting to citizenship an alien who was guilty of one act of adultery during the probationary period.⁹

An alien who neglected to support his infant children in Norway after he came to the United States was denied citizenship on the grounds that he had not established the required moral behavior.¹⁰

Citizenship was denied to an alien as not of good moral character where he with another alien approached the chambers of the court in which his petition for naturalization was pending and attempted to pass two five-dollar

⁸*U. S. v. Clifford*, 89 F. (2d) 184.

⁹*Estrin v. United States*, 80 F. (2d) 105.

¹⁰*In re Nosen, supra*, note 3.

bills to the judge's secretary with the promise of further reward in the event of his admission to citizenship.¹¹

Naturalization was denied on the ground of failure to establish the required good moral character where the court in a divorce action granted alien's wife a divorce on the ground of "cruel and barbarous treatment." The court measured the behavior of the alien within the meaning of the naturalization statute by the moral standard of the average citizen in the community and concluded that "the average citizen, whether he be husband or wife, is not guilty of cruel and barbarous treatment of the other spouse."¹²

False Statements in Naturalization Proceedings.

The arrest and conviction of appellee occurred in a county other than where the petition for naturalization was filed and in a city a considerable distance from Los Angeles where her petition was filed and where it might well have been assumed unlikely that any neighborhood investigation would be conducted by the Immigration and Naturalization Service. The denial and concealment was knowingly and deliberately made [R. 20, 38, 39, 40, 41, 42, 61] and it was not until sometime after the filing of the petition for naturalization when confronted with the record of her conviction, that appellee admitted the true facts [R. 33, 38].

False statements in the naturalization proceeding have long ago come to the attention of the Courts and Congress.

¹¹*Petition of Oganesoff, supra*, note 7.

¹²*Application of Polivka*, 30 F. Supp. 67.

In a suit brought to cancel citizenship on the grounds of fraud decided by the United States Supreme Court on June 10, 1946,¹³ the Court stressed the point that:

“* * * Congress has provided that fraud is a basis for cancellation of a certificate of naturalization
* * * The legislative history of that enactment shows that false swearing was one of the evils included in the statutory grounds for denaturalization.
* * * A certificate obtained by fraud is clearly within the reach of Congressional power. * * *
To hold otherwise would be an anomaly. It would in effect mean that where a person through concealment, misrepresentation or deceit perpetrated by a fraud on the naturalization court, the United States would be remediless to correct the wrong. That would indeed put a premium on the successful perpetration of frauds against the nation * * * We adhere to the prior rulings of this Court that Congress may provide for the cancellation of certificates of naturalization on the grounds of fraud in their procurement and thus protect the courts and the nation against practices of aliens who by deceitful methods obtained the cherished status of citizenship * * *.”

It is of transcendent importance that the alien petitioner for naturalization at least make a full and frank disclosure concerning all matters about which inquiry is made of him concerning his qualifications during the naturalization proceeding. An alien who deliberately makes false statements in his proceeding for naturalization is deficient in the good moral character that is requi-

¹³*Knauer v. United States*, 66 S. Ct. 1304, at pp. 1313, 1314, 1315. See, also, *United States v. Ness*, 38 S. Ct. 118, 120, 245 U. S. 319, 324, 62 L. Ed. 321.

site to the granting of naturalization.¹⁴ This may be so even when revelation of the true facts would not in itself have been sufficient to bar naturalization.¹⁵

The Courts have denied naturalization petitions because of false statements in the naturalization proceedings in the following situations:

False statements concerning absences from the United States of the petitioner for naturalization.¹⁶ False statements in the naturalization proceeding concerning the true allegiance of the alien.¹⁷ False statements in the naturalization proceeding as to date of birth,¹⁸ marital status,¹⁹ name,²⁰ and residence.²¹ Fourteen years after false statements were made in the naturalization proceeding concealing criminal records, citizenship was revoked by the Court.²² Citizenship was revoked where during the naturalization hearing the Court asked whether there was proof of conviction of the "sale of intoxicating liquor."

¹⁴*In re Talarico*, 197 Fed. 1019; *U. S. v. Chiaravalle*, 45 F. Supp. 509; *U. S. v. Mira*, 41 F. Supp. 224.

¹⁵*U. S. v. Etheridge*, 41 F. (2d) 762; *U. S. v. Goldstein*, 30 F. Supp. 771; *U. S. v. Marcus*, 1 F. Supp. 29; *U. S. v. Albertini*, 206 Fed. 133.

¹⁶*U. S. v. Mira*, *supra*, note 14.

¹⁷*U. S. v. Chiaravalle*, *supra*, note 14.

¹⁸*U. S. v. Goldstein*, *supra*, note 15.

¹⁹*U. S. v. Mira*, *supra*, note 14; *U. S. v. Rutman*, 27 F. Supp. 891; *U. S. v. Marcus*, *supra*, note 15; *U. S. v. Albertini*, 206 Fed. 133, and *In re Zycholc*, 43 F. (2d) 438.

²⁰*U. S. v. Goldstein*, *supra*, note 15, and *In re Zycholc*, *supra*, note 19.

²¹*U. S. v. Rutman*, *supra*, note 19.

²²*U. S. v. Brass*, 37 F. Supp. 698.

The alien was the only one present that knew that he had been convicted on a charge of "sale of intoxicating liquor." He stood mute. The Court pointed out that where a party conceals a fact that is material to a transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment may be as much a fraud as if the existence of the fact were expressly denied, or the reverse of it expressly stated.²³ Citizenship was revoked where the alien during the naturalization proceeding admitted he had been arrested for a traffic violation, but concealed conviction of criminal charges occurring considerably prior to the beginning of the five-year probationary period immediately preceding the date of filing petition for naturalization. The Court stating that it is incumbent on the alien when requested, to honestly and truthfully disclose the facts bearing on his moral conduct during and before the five-year period, in order that the court may determine whether, taking into account his whole conduct, he has in fact been a man of good moral character during the five-year period.²⁴ The Third Circuit Court of Appeals reversed the District Court in an action instituted in the lower court to cancel citizenship where the alien-applicant had denied under oath before a Naturalization Examiner that he had ever been arrested and wilfully and knowingly concealed from such government representative his criminal record. The lower court

²³*U. S. v. De Francis*, 50 F. (2d) 497.

²⁴*U. S. v. Etheridge*, *supra*, note 15.

had held that the legal justification for an order of revocation must be based upon a fraud upon the court. The Circuit Court took the view that the examination before the Naturalization Examiner was but one step in ascertaining whether the alien was a fit candidate for citizenship. The Court further pointed out that naturalization is one of the highest gifts which can be conferred by the United States, and that for this reason the alien must deal with the utmost good faith toward the government.²⁵ Naturalization was revoked on the grounds of a failure to establish the requisite, good moral character, where the alien-applicant had been a resident of the United States for forty-one years and had denied that he had been asked the question concerning any arrests.²⁶ In another case the Court held that where the original petition for naturalization had been denied because of false statements concealing arrests made to the Chief Naturalization Examiner who was "charged with the duty of examining applicants for naturalization under oath, preparatory to their appearance in court for a hearing upon their petitions," that on the filing of a subsequent petition prior to the expiration of five years from the date of concealing his arrests by false statements to the Examiner, the prior denial was *res adjudicata* of the matters made the ground of refusal to grant the original petition.²⁷

²⁵*U. S. v. Saracino*, 43 F. (2d) 76.

²⁶*U. S. v. Mancini*, 29 F. Supp. 44.

²⁷*In re Talamico*, 197 Fed. 1019.

Conclusion.

The conduct of the appellee at Palm Springs during the probationary period for naturalization did not measure up to the standards of morality of that community or the community in which she resided during the five years immediately preceding the date of filing her petition for naturalization.

The deliberate concealment of her arrest and convictions in the naturalization proceeding demonstrated a lack of the moral fitness required to be established under the naturalization law precedent to the grant of the high privilege of United States citizenship. On the basis of sound public policy citizenship should not be granted in such circumstances. To hold otherwise would put a premium on the successful perpetration of frauds against the government in naturalization proceedings.

Respectfully submitted,

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